

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 21, 2015**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2014AP2301-CR**

**Cir. Ct. No. 2013CF550**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TIMOTHY J. JOHNSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments of the circuit court for Fond du lac County: PETER L. GRIMM, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Timothy Johnson appeals from judgments convicting him of felony bail jumping and misdemeanor receiving stolen property. On appeal, Johnson challenges the circuit court's discretionary decision to permit the State to amend the information during trial from misdemeanor theft to

misdemeanor receiving stolen property. We conclude that the circuit court did not misuse its discretion, and we affirm the judgments.

¶2 The charging document may be amended at trial “to conform to the proof where such amendment is not prejudicial to the defendant.” WIS. STAT. § 971.29(2) (2013-14). Whether to allow an amendment is within the circuit court’s discretion. *State v. Malcom*, 2001 WI App 291, ¶23, 249 Wis. 2d 403, 638 N.W.2d 918. We will affirm the court’s discretionary decision if there was a reasonable basis for the ruling. *Id.*

¶3 Johnson was originally charged with misdemeanor theft because he cashed checks that were stolen from his mother and forged. Johnson’s girlfriend, Rebecca Vis, later confessed that she stole the checks and forged them for Johnson to cash, duping him into believing his mother intended for him to cash the checks.<sup>1</sup>

¶4 On the first day of the February 2014 trial, the State sought to amend the charge against Johnson to party to the crime. The circuit court permitted the party-to-the-crime amendment after finding that Johnson would not be prejudiced because his trial defense would likely be that Vis stole and forged the checks without his knowledge. The court noted that it would be a jury question as to whether Johnson lacked knowledge of the theft and was duped by Vis. If the jury believed Johnson, he would escape both direct and party-to-the-crime liability for the theft.

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<sup>1</sup> Vis’s involvement in the crime was known to the parties at least since December 13, 2013, when during a hearing, Vis’s confession was discussed.

¶5 At trial, Johnson did not deny cashing the forged checks at local businesses. Johnson's opening statement set out his defense: Vis stole and forged the checks without his knowledge and duped him into believing that his mother had written the checks for him to cash.

¶6 Johnson's mother, Donna, testified about the stolen and forged checks, her belief that Johnson was involved, and her suspicion that Vis was also involved. Before Johnson began cross-examining Donna, the State advised that it was considering amending the theft charge to receiving stolen property. The prosecutor advised the court that he and defense counsel had discussed this possibility the Friday before the trial started. On cross-examination, Donna agreed that the handwriting on the checks did not resemble Johnson's handwriting.

¶7 Johnson testified that Vis stole and forged his mother's checks without his knowledge, and Vis lied to him when she said that his mother had written the checks for him to cash. Johnson claimed he was an innocent dupe.

¶8 The jury heard Vis's letter to the district attorney confessing her involvement in the theft and forgery and denying that Johnson had any involvement or knowledge of the crimes. When called as a defense witness, Vis invoked her Fifth Amendment right to remain silent. A detective testified that Vis's handwriting was similar to the handwriting on the stolen and forged checks.

¶9 At the conclusion of the first day of trial, the State again raised the possibility of amending the theft charge. At the start of the second day of trial, the State moved to amend the theft charge to receiving stolen property. Johnson objected due to lack of notice. Over Johnson's objection, the circuit court permitted the amendment because Johnson's defense—Vis committed the crime and duped him—remained a viable defense to receiving stolen property because

theft and receiving stolen property each require knowledge that the owner was deprived of his or her property.<sup>2</sup> Throughout the case, Johnson steadfastly denied that he knew that his mother's checks were illegally obtained and cashed. The court found that the evidence adduced at trial supported the amendment to receiving stolen property.

¶10 Johnson's defense remained unchanged after the amendment. In his closing argument, Johnson maintained that he was innocent, did not know the checks written on his mother's account were stolen and forged, and Vis duped him into cashing the checks. The jury convicted Johnson of felony bail jumping and misdemeanor receiving stolen property.

¶11 On appeal, Johnson argues that he was prejudiced by the amendment because he lacked adequate notice and the amendment introduced a new crime to which he was not prepared to offer a defense.

¶12 Amendments can be made during the defense's case. *Id.*, ¶29. Johnson had adequate notice of the possibility of an amendment. Vis's confession was known to the parties more than two months before trial began. The State raised the possibility of an amendment before and during trial. Johnson had notice, *id.*, ¶30, and he does not explain how more notice would have allowed him to defend himself more effectively.

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<sup>2</sup> The elements of theft are: the defendant intentionally took and carried away the movable property of another knowing that the owner had not consented and with an intention to deprive the owner permanently of the property. WIS JI—CRIMINAL 1441. The elements of receiving stolen property are: the defendant knowingly or intentionally received or concealed stolen property and the defendant knew it was stolen property. WIS JI—CRIMINAL 1481.

¶13 Johnson makes an unsupported claim of prejudice arising from the amendment. He does not explain how he was prejudiced, how his defense would have changed had the amendment occurred earlier in the case, or what other evidence he would have presented if he had more notice.

¶14 The record does not support Johnson's claim of prejudice. Johnson offered the same defense in his opening statement, trial testimony, and closing argument. The receiving stolen property charge relied upon the same evidence as the theft charge and did not require Johnson to alter his "I was duped" defense. *See id.*, ¶¶28-29. Amendments charging a different crime based on the same facts are not barred, particularly where the defense to the crimes is the same. *See State v. Frey*, 178 Wis. 2d 729, 736-37, 505 N.W.2d 786 (Ct. App. 1993). Had the jury believed that Johnson was an innocent dupe, the jury would have had a basis for acquitting him.

¶15 Under the facts of this case and the defense selected by Johnson, he was not prejudiced by the receiving stolen property amendment. The circuit court properly exercised its discretion in permitting the State to amend the information during trial.

*By the Court.*—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

